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Ivan J. Heslop v. Bank of Utah : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

IVAN J. HESLOP, Plaintiff, Appellee, and Cross-Appellant, vs. BANK OF UTAH, a Utah banking corporation, Defendant, Appellant, and Cross-Appellee.	)	Civil No. 900532 Priority No. 16

REPLY BRIEF OF APPELLANT BANK OF UTAH

Appeal from Judgment Entered in the
Second Judicial District Court of Weber County,
State of Utah, Honorable David E. Roth, Presiding

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STATEMENT OF ISSUES PRESENTED FOR REVIEW ON CROSS APPEAL, STANDARD OF APPELLATE REVIEW, AND SUPPORTING AUTHORITY

1. Did the trial court err in ruling, as a matter of law, that attorney's fees are not recoverable as consequential damages in a wrongful termination action?

Standard of Review: Correctness of the court's ruling. See Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985).

2. Did the trial court err in dismissing Heslop's contractual public policy claim at the close of Heslop's case in chief?

Standard of Review: No substantial evidence to support the claim. Brehany v. Nordstroms, Inc., 812 P.2d 49 (Utah 1991).

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Trial Court

The trial court ruled, as a matter of law that Heslop's attorney's fees were not consequential damages. (Tr. 1565)

During the hearing on the Bank of Utah's (hereinafter "Bank") Motion for JNOV or, in the Alternative, for New Trial, the trial court rejected Heslop's argument that the Bank failed to object to the court's refusal to instruct the jury to disregard the accrual and related evidence once the public policy claim was dismissed. The issue is properly before the Court. (Supplemental Transcript on Appeal, hereinafter Supp. Tr., 28-29, attached hereto as Addendum 1)

In his order denying the Bank's Motion for JNOV/New Trial, Judge Roth specifically removed language from the order that the verdict of constructive discharge was supported by "substantial" evidence. The order simply states there was evidence to support this finding. (R. 1184)

B. Additional Statement of Facts

After the Bank was reorganized in January, 1983, company cars were taken away from all officers, not just Heslop. (Tr. 1060-61)

SUMMARY OF ARGUMENT

1. The jury's verdict must be supported by substantial evidence. Only admissible and competent evidence counts as substantial. The verdict of constructive discharge was not supported by substantial evidence because it was based on Heslop's self-interested, implausible testimony and on inadmissible and prejudicial evidence. The verdict of implied-in-fact contract was not supported by substantial evidence because it was based on oral representations and/or course of conduct which was not admissible in the face of an unambiguous employee handbook containing no provisions for termination only for cause. Heslop's employment application unambiguously stated he was an employee at will. Absent fraud or imposition he is estopped to deny it. The jury verdict finding no good cause to terminate was not supported by substantial evidence where Heslop lied to the bank about the Gabbert loan.

2. In the alternative to ordering judgment in favor of the bank, the court should order a new trial due to the insufficiency of the evidence and the admission of prejudicial evidence.

3. Heslop's own testimony that he had an employment contract until age 65 terminable only for cause is barred by U.C.A. § 25-5-4(1) because "by its terms [it] is not to be performed within one year".

4. Attorney's fees should not be awarded as consequential damages in an implied-in-fact contract case. Where the contract is implied only, the parties would not have reasonably foreseen attorney's fees as a consequential damage item. No Utah employment cases have held attorney's fees are recoverable in this context.

5. The trial court correctly granted summary judgment on Heslop's claimed breach of implied covenant of good faith and fair dealing because Utah does not recognize such a claim in the context of this wrongful termination case. Brehany v. Nordstroms, Inc., infra.

6. Heslop's tort public policy claim was properly dismissed on summary judgment because Utah does not recognize such a claim. Furthermore, the court properly granted the Bank's motion to dismiss the contract public policy claim at the end of Heslop's evidence because there was no causal connection between the alleged public policy violations and Heslop's resignation from the bank. Browning's refusal to accept Heslop's offer of

resignation in January 1983 cut off any causal connection between his termination and the alleged violation of the call report statute prior to January of 1983. Heslop's failure to report illegal conduct to regulatory authorities bars his public policy claim. There is no evidence Heslop was terminated because he refused to perform a requested illegal act, which bars the public policy claim. The evidence of a public policy violation is the same, whether it is considered a tort or a contract claim. Therefore, summary judgment on the tort public policy claim can be affirmed based on the absence of any substantial evidence to support the contract public policy claim.

ARGUMENT

POINT I.

THE JURY'S VERDICT WAS NOT SUPPORTED BY SUBSTANTIAL, RELEVANT AND ADMISSIBLE EVIDENCE.

A. The Bank Is Not Required to Marshal Inadmissible Evidence

Heslop argues the Bank failed to properly marshal the evidence. Heslop's criticism is unfounded. A jury verdict can only be sustained upon "believable and admissible evidence," Durfey v. Board of Ed. of Wayne Cty., Etc., 604 P.2d 480 (Utah 1979) (emphasis added); In Re Estate of Hubbard, 30 Utah 2d 260, 516 P.2d 741 (1973). Therefore, any failure to marshal inadmissible evidence cannot be a basis for affirming the jury verdict. Nonetheless, the Bank did marshal evidence which Heslop claims supports the jury's verdict (including

inadmissible evidence) in great detail, including, inter alia: Bank's policy to terminate only for cause (Bank's Initial Brief, hereinafter Br., 7, 9); Heslop's employment history (Br. 9-10); accrual account problems, including wash entries and Heslop's favoring a one-time resolution to the problem (Br. 10-16, 24); Attorney General's investigation (Br. 16-18); hiring of Timmons, his salary, and payments to Peat, Marwick (Br. 18-21, 36-37); Heslop's claim he was demoted (Br. 23); Heslop's testimony West told him to commit the Gabbert loan before an appraisal (Br. 27); Heslop's testimony Kleyn demanded Heslop's written resignation (Br. 33); Beutler's resignation and termination of Carlsen (Br. 38).

B. The Jury's Verdict Must Be Supported By Substantial Relevant Evidence

This Court will reverse a jury verdict where it is not supported by substantial evidence. Canyon Country Store v. Bracey, 781 P.2d 414, 417 (Utah 1989) The verdict must be supported by substantial competent evidence.'" Id. at 418. Accord, Cambelt Intern. Corp. v. Dalton, 745 P.2d 1239 (Utah 1987). ("We will not overturn that verdict when it is supported by substantial and competent evidence.")

In Utah State Road Comm'n v. Steele Ranch, 533 P.2d 888 (Utah 1975), the Supreme Court held there was no substantial evidence to support a $75,000 severance damage verdict and defined substantial as follows:

> . . . the modifying adjective "substantial" has been used advisedly to indicate a higher degree

> of proof than just any evidence of any kind. The requirement is that the evidence must be sufficient in amount and credibility that, when considered in connection with the other evidence and circumstances shown in the case, would justify some, but not necessarily all, reasonable minds acting fairly thereon, to believe it to be the truth. And conversely, if when so considered, the court is convinced that it is so inconsequential, or so clearly lacking in credibility, that no jury acting fairly and reasonably could so believe, it cannot properly be regarded as substantial evidence.

533 P.2d at 890 (emphasis added). The Court concluded the evidence was insufficient because the owner's testimony "may well have been suffused with a high degree of self-interest." 533 P.2d at 891.

"When testimony of witnesses is in conflict, we accept that testimony which supports the jury's verdict, unless it is inherently implausible . . .." Hodges v. Gibson Products Co., 811 P.2d 151 (Utah 1991) (emphasis added).

In determining whether there is substantial evidence to support the verdict in the instant case, the Court is entitled to consider sufficiency of the evidence in amount and credibility, self-interest of plaintiff's own testimony, and implausibility of testimony.

1. **The Jury's Verdict That Heslop Was Constructively Discharged Does Not Meet the Substantial Evidence Standard.**

   (a) Self-Interested, Implausible, and Uncorroborated Testimony.

Heslop's claim of constructive discharge was built upon his own, self-interested testimony, which was in conflict with the

testimony of other witnesses. Specifically, Heslop's testimony regarding the $50,000 condition for closing the Gabbert loan was directly contradicted by West who testified the loan should not have been closed and the money disbursed unless the $50,000 condition was met (Tr. 557-58) which it was not. (Tr. 558, 1079-80, 1278-79, 1389)

Next, Heslop's testimony that Kleyn, upon orders from Timmons, demanded his written resignation, was contradicted by all other witnesses (West, Kleyn, and Timmons) who testified regarding that issue. (Tr. 569-70, 775-76, 788-89, 1286)

Kleyn, West, and Timmons had not been employed by the Bank for several years when the case was tried. (Tr. 502, 756-57, 777-78, 1221-22) None of them had self-interest to protect by testifying as they did regarding the resignation issue. Heslop's testimony was clearly self-interested, as is shown by the great significance he places on his assertion that Timmons demanded his resignation. (See Heslop's Brief at 38, 42, 46, 59) Heslop's testimony is incredible and implausible on the resignation issue.

Further, there was no evidence except Heslop's that he had no reasonable alternative to resigning after his lending authority was revoked. Kleyn and West both testified Heslop could have continued to work as a lending officer. (Tr. 569, 791) Whether an employer's act constitutes a constructive discharge is not determined by the employee's subjective reaction to it. Bihlmaier v. Carson, 603 P.2d 790 (Utah 1979).

Significantly, even the trial judge, after having heard all the evidence, was not convinced there was "substantial" evidence to support the jury's verdict on the constructive discharge claim. (R. 1184) Thus, it was error to deny the Bank's motion for JNOV.

(b) Browning's Refusal To Accept Heslop's Resignation In January 1983.

Browning's refusal, in January 1983, to accept Heslop's offer to resign undercuts the argument that evidence of the accrual account and pre-1983 related events is relevant. Heslop downplays Browning's refusal, citing Browning's testimony that he wanted to avoid turnover of key personnel. This testimony, however, does not support Heslop's claim that he was put in a dead-end position to force him to resign. Conversely, it is perfectly consistent with the Bank's position that Heslop was made agricultural loan specialist because he could best serve the Bank in that position and not as punishment for prior acts.

(c) Heslop Was Not Singled Out For A Pattern of Mistreatment

Cases cited by Heslop supporting his claim of constructive discharge are distinguishable. In Real v. Continental Group, Inc., 627 F.Supp. 434 (N.D. Cal. 1986), the evidence showed Real was passed over for a promotion because of his age; was demoted to a new position which was subsequently eliminated; was offered a new position but denied relocation benefits which were typically granted to others; was denied a request for a

different position; and was ultimately offered a new job which involved a nine grade demotion. The court found Real "was subjected to a continuous pattern of discriminatory treatment."

The court distinguished Real's claim from Frazer v. KFC National Management Co., 491 F.Supp. 1099 (N.D. Ga. 1980), in which there was no constructive discharge where plaintiff quit rather than be demoted even though his salary and benefits stayed the same. Frazer is more analogous to Heslop's case than Real. Real involved several instances of discriminatory conduct directed specifically at plaintiff. The same cannot be said of Heslop.

Heslop also argues, relying on Spulak v. K-Mart Corp., 894 F.2d 1150 (10th Cir. 1990) that he was constructively discharged because the Bank's actions were unduly harsh to him as opposed to co-workers. He asserts he was placed in a dead-end position and told he could make no agricultural loans. (Heslop Brief at 42) Heslop conveniently fails to cite his own testimony that even after reorganization, he could still make commercial loans (Tr. 376) and did make new agricultural loans to existing customers. (Tr. 374)

The agricultural lending policy was Bank-wide, clearly not directed solely at Heslop. The Bank had problems in 1981-82, and sweeping changes were made to address them, all of which were approved by the entire Board. (Exh. 77D, 78D) It is implausible to suggest the Bank would approve both a

reorganization and a new loan policy with the object of singling out Heslop. No employee is that important.

Even revocation of lending authority was not exclusively aimed at Heslop. (Tr. 568-69, 637-38, 1057, 1091, 1249, 1283-84; Exh. 16-P) Total revocation of Heslop's independent lending authority was a single incident, and not sufficient to establish a constructive discharge.

(d) Heslop Was Not Given An Ultimatum Or Condition For Continued Employment.

Zilmer v. Carnation Co., 263 Cal. Rptr. 422 (Cal. App. 1989), does not support Heslop's claim of constructive discharge. Zilmer was told that obtaining a certified management accountant certificate was a pre-condition to his continued employment, without exception. After Zilmer's termination, this requirement was not enforced by the company. No such condition was put on Heslop's continued employment.

In Spulak, supra, plaintiff "was given an ultimatum either to retire or be fired." Id. at 1154. This did not happen with Heslop, but again shows the significance of his claim he was told to resign by Kleyn.

Price v. Boulder Valley School D.R.-2, 782 P.2d 821 (Colo. App. 1989) is dissimilar from the instant case. Price was a school teacher diagnosed as manic-depressive who suffered an emotional breakdown. His principal prepared a letter of resignation for Price and presented it to him for signature on several occasions. Price ultimately signed the resignation

letter. This is clearly different from the factual situation in Heslop's case.

(e) There Was No Pattern Of Termination Of Long-Term Employees.

There are significant inconsistencies in Heslop's interpretation of the alleged relevant evidence. Heslop argues terminations of other employees were relevant to show a pattern of placing long-term employees in dead-end positions so they would quit. This so-called pattern involved only two employees (West and Peacock), both of whose positions were changed and who left the Bank after Heslop resigned. (Heslop's Brief at 29-30) Carlsen's termination the same month as Heslop resigned does not fit the pattern because he was expressly fired. The two major reductions of force in 1983, do not follow the pattern. Furthermore, West and Kleyn, both long-term employees (Exh. 57D, 64D) were not put in dead-end positions when the Bank reorganized. West was made senior lending officer. (Exh. 78D)

The evidence of other employees' terminations does not meet the admissibility standard of Rule 406, U. R. E. on evidence of routine practice. Heslop relies on Spulak, supra, to support the admissibility of this evidence. However, Spulak was an age discrimination claim where such evidence was "relevant to the issue of the employer's discriminatory intent." 894 F.2d at 1156 (emphasis added). Heslop asserts no such issue in the instant case.

Heslop's pattern theory is irreconcilable with his testimony that Timmons told Kleyn to demand Heslop's resignation. If Timmons could not fire Heslop and instead put him in a dead-end position so he would quit, how could he demand resignation? Heslop cannot have it both ways.

Erickson v. Wasatch Manor, Inc., 802 P.2d 1323 (Utah App. 1990), is distinguishable. It involved testimony of prior accidents at the same location plaintiff fell as well as prior notice of a defect. In the instant case, the other terminations occurred after Heslop left the Bank. Finally, the evidence was not relevant to show the former employees' bias. Heslop did not intend to discredit his own witnesses by showing their bias, and the Bank objected to the testimony in the first place.

(f) Cases Cited By The Bank Are Persuasive.

Although Heslop did not have an express written agreement for a specific period of time, his assertion throughout the case that he had an employment contract terminable only for cause, and that the Bank had no cause to terminate, makes his resignation just as voluntary as the resignations which occurred in Knee and Christi. (Br. 52, 54-55)

(g) Prejudicial Evidence Was Improperly Admitted.

Heslop's position that evidence of wash entries, the investigation of the Bank, and the audit by Peat, Marwick was relevant to show the correctness of Heslop's position on resolving the accrual problem (Heslop Brief at 54) is superfluous. The Bank never claimed Heslop's position was not

correct. Yet this evidence was extremely prejudicial because it tended to show the Bank was engaged in criminal conduct.

Heslop argues evidence of Timmons' salary and the payments to Peat, Marwick was relevant to counter the Bank's claim it was contracting rather than expanding in 1983. Any limited probative value the evidence had on that issue was clearly outweighed by the substantial prejudice of the evidence. Heslop used speculative innuendo that the payments to Peat, Marwick showed a strategy to use Timmons to intercede with the Attorney General's investigation so that Browning rewarded him with the president's job, a large salary, and inordinate power sufficient to discharge employees. (Heslop Brief at 55)

Heslop understandably provided no citation to the record for this theory because there was no such evidence. Moreover, the theory is contradictory. Timmons was supposedly given inordinate power to wrongfully discharge employees, yet conversely, he did not have authority to expressly fire Heslop.

Once the irrelevant and prejudicial evidence is eliminated, that which remains (reorganization and revocation of lending authority) does not meet the substantial evidence requirement for affirmance of the constructive discharge verdict.

2. No Substantial Evidence to Support Verdict of an Implied-in-Fact Contract Terminable Only For Good Cause

The Supreme Court addressed the implied-in-fact contract exception in Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1991). It stated that evidence of "the employer's course of

conduct, and pertinent oral representations" is relevant to determine if an employment manual creates an implied-in-fact contract, but only where the language of the manual is ambiguous. "Thus, when it is plain that a manual or bulletin does not limit the right to discharge at will, the case need not go to a jury." 161 U.A.R. at 11.

The Bank's employment handbook (Exh. 27P) did not contain any provision providing for termination only for cause. Thus, Brehany suggests evidence of course of conduct and oral representations are not relevant. Heslop bases his implied-in-fact contract claim almost exclusively on course of conduct and/or oral representations.

Heslop argues his employment application was not a contract and relies on McLain v. Great American Ins. Co., 256 Cal. Rptr. 863 (Cal. App. 1989), where the court allowed parol evidence because the application was not an integrated contract, but also because it found the at-will language in the application was ambiguous. No such ambiguity exists in Heslop's application, in which he expressly "agree[d] that any employment . . . will depend upon my usefulness to the Bank, in its sole discretion; the Bank reserving the right to release me without notice, its obligation ending with the payment of salary through the last day I work." (Exh. 1P)

In Wilkerson v. Wells Fargo Bank, 261 Cal.Rptr. 185 (Cal. App. 1989), another case relied on by Heslop, the employee did not sign an at-will application or agreement. In fact, the

court distinguished Wilkerson from an earlier California case, Shapiro v. Wells Fargo Realty Advisors, 199 Cal. Rptr. 613 (Cal. App. 1984), which held a stock option agreement signed by the employee, "which expressly defined the employment relationship as being at-will" could not be overridden by an implied contract. Shapiro, similar to Berube, stated "'[t]here cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results.'" Wilkerson (quoting Shapiro), 261 Cal. Rptr. at 190.

Even if Heslop's rehire is considered new employment, the evidence was undisputed that the prior employment application was revived. (Tr. 884-85, 1016-17) Heslop's employment application containing the at-will agreement remained a part of his personnel file during the entire time he was employed. "'The general rule is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its explicit provisions are contrary to his intentions and understanding . . ..'" Anderson v. Savin Corp., 254 Cal. Rptr. 627 (Cal. App. 1988)

3. No Substantial Evidence Supported the Jury's Verdict That the Bank Did Not Have Good Cause

The Bank's position has always been it did not fire Heslop. The real question was whether there was good cause to revoke Heslop's lending authority. Heslop's Brief is conspicuously

silent regarding his misrepresentation that Gabbert invested $50,000 into the dairy project.

Heslop compounded the Gabbert loan's inherent problems by misrepresenting the true facts surrounding the loan when he was questioned about it. Heslop lied to his employer, which is good cause to terminate. O'Driscoll v. Hercules, Inc., 745 F.Supp. 656 (D. Utah 1990) (Summary judgment granted in favor of employer in wrongful discharge action, holding that after-discovered evidence of employee's misrepresentations regarding her true age and past employment applications was an independent basis, as a matter of law, justifying termination). See also Summers v. State Farm Mutual Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1989). An employer should have the discretion to discipline an employee who lies about a bad $260,000 loan without fear of liability for constructive discharge. Berube recognized "that due deference be paid to managerial discretion and normal employment decisions." 771 P.2d at 1045-46.

POINT II.

NEW TRIAL IS NECESSARY BECAUSE OF ADMISSION OF IRRELEVANT AND PREJUDICIAL EVIDENCE.

For the same reasons set forth in POINT I, supra, the relevant evidence was insufficient to support the jury's verdict, and the Bank was prejudiced by introduction of irrelevant evidence. This Court should, in the alternative to ordering entry of judgment for the Bank, remand for a new trial and order the inadmissibility of evidence regarding the accrual

problem and events related thereto, Timmons' hiring and salary, payments to Peat Marwick, and terminations of other employees.

POINT III.

THE STATUTE OF FRAUDS DOES BAR HESLOP'S CLAIM.

Heslop's brief does not address the specific language of Utah's statute of frauds, U.C.A. §25-5-4(1), which requires a writing for "[e]very agreement that by its terms is not to be performed within one year from the making" thereof.

There is a difference between a contract of "permanent" or "lifetime" employment and a contract for a specific number of years until retirement. Heslop claimed the latter, which by its terms is not to be performed within one year.

POINT IV.

ATTORNEY'S FEES WERE PROPERLY EXCLUDED AS AN ITEM OF CONSEQUENTIAL DAMAGES.

Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989), was an action for failure to pay a first-party insurance claim, not an employment case. The Supreme Court stated, "'Utah adheres to the well-established rule that attorney's fees generally cannot be recovered unless provided for by statute or by contract.'" Id. at 419. The court did hold that in the context of that specific case, attorney's fees could be recovered as "an item of consequential damages flowing from the insurers' breach of contract." Id. at 420.

Beck v. Farmers Ins. Exchange, 701 P.2d 795 (Utah 1985), another first-party insurance case stated consequential damages

are "those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." Id. at 801 (emphasis added) Beck involved a specific insurance contract. In that context, a jury could presumably determine what was reasonably foreseeable.

However, the Bank could not have reasonably foreseen attorney's fees as a consequential damage for breach of an implied contract it did not even think existed. Beck implicitly recognized this: "The foreseeability of any such damages will always hinge upon the nature and language of the contract and the reasonable expectations of the parties." Id. at 802 (emphasis added)

Berube said nothing about attorney's fees as consequential damages for breach of an implied-in-fact contract of employment. None of the post-Berube employment cases have stated attorney's fees are consequential damages.

Moreover, Zions First Nat. Bank v. Nat. Am. Title Ins., 749 P.2d 651 (Utah 1988), discussed an award of attorney's fees as consequential damages only in the context of "an implied contractual obligation to perform a first-party insurance contract fairly and in good faith", Id. at 657, which is inapposite to the instant case because Utah does not recognize such an implied obligation in employment cases. See POINT VI, supra.

If Heslop's position were adopted, the contract exception to the general rule disallowing recovery of attorney's fees would

be unnecessary since attorney's fees could always be claimed as consequential damage of a contract breach.

POINT V.

HESLOP'S CAUSE OF ACTION FOR BREACH OF AN IMPLIED IN-LAW COVENANT OF GOOD FAITH AND FAIR DEALING WAS PROPERLY DISMISSED.

In Brehany v. Nordstrom, Inc., supra (filed May 16, 1991), this Court definitively held there is no implied-in-law covenant of good faith and fair dealing in an employment case. Although the Court recognized "every contract is subject to an implied covenant of good faith," it further held this general principle "cannot be construed to change an indefinite-term, at-will employment contract into a contract that requires an employer to have good cause to justify a discharge." The Court concluded "the trial court erred in instructing the jury that it could find for the plaintiffs on the basis of a breach of an implied-in-law covenant of good faith and fair dealing." 161 U.A.R. at 10. See also Caldwell v. Ford, Bacon and Davis, Utah, Inc., 777 P.2d 483, 485 (Utah 1989).

The law could not be more clear in Utah on this point and should not be changed.

POINT VI.

HESLOP'S PUBLIC POLICY CLAIMS, SOUNDING IN TORT AND CONTRACT, WERE PROPERLY DISMISSED BY THE TRIAL COURT.

A. The Trial Court Properly Granted Summary Judgment on Heslop's Public Policy Claims Sounding in Tort

In Lowe v. Sorenson Research Co., Inc., 779 P.2d 668 (Utah 1989), plaintiff asserted a public policy tort claim associated with her alleged wrongful discharge. The trial court granted defendant's motion to dismiss, the Supreme Court reversed, but solely on the grounds that "the facts support a claim for contract damages under Berube." Id. at 670 (emphasis added). The Court further stated that in Berube, "we refused to recognize a variety of wrongful discharge actions sounding in tort." The tort public policy cause of action has therefore been rejected.

In Brockmeyer v. Dunn and Bradstreet, 335 N.W.2d 834 (Wisc. 1983), the Wisconsin Supreme Court stated:

> We believe that reinstatement and back pay are the most appropriate remedies for public policy exception wrongful discharges since the primary concern in these actions is to make the wronged employee "whole." Therefore, we conclude that a contract action is most appropriate for wrongful discharges.

Id. at 834. See also M.B.M. Co. Inc. v. Counce, 596 S.W.2d 681 (Ark. 1980); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) holding the public policy excpetion does not create a tort claim.

That a majority of jurisdictions which recognize the public policy exception hold it creates a tort action is not determinitive. This Court refused to follow the majority rule which recognized a tort action for breach of the implied covenant of good faith and fair dealing in Beck v. Farmers Ins. Exchange, supra, but rather held such a breach gives rise only to a contract claim.

Heslop's request that the Court remand the case for further proceedings regarding the tort public policy theory, including punitive damages, (Heslop Brief at 78) could not possibly be done without a complete new trial. Moreover, the evidence of a public policy violation will not change whether it is a tort or a contract claim. As shown below, Heslop was unable to produce evidence sufficient to prove his claim.

B. The Evidence Was Insufficient, as a Matter of Law, to Establish a Public Policy Claim

The trial court's dismissal of Heslop's contract public policy claim was "a directed verdict at the close of the evidence offered by an opponent." Rule 50(a), U.R.C.P. This Court will affirm if "no substantial evidence supported each element of a cause of action." Brehany v. Nordstrom, Inc., supra.

Berube indicated the public policy exception should be construed and applied narrowly. 771 P.2d at 1043. Applying that standard, the trial court was correct in concluding there was no causal connection between Heslop's cooperation with the

Attorney General and the receipt of Heslop's notes by the Bank's attorneys and Heslop's ultimate termination. Browning's refusal to accept Heslop's offer to resign was an independent intervening act which cut off any such causal connection. The trial court also found no public policy violation was involved in the subpoenaing of Heslop's notes in the Beutler case since the Bank never told Heslop to disobey the subpoena. That the content of the notes might have caused some problems is not a public policy issue. (Tr. 1149-51 attached as Addendum 2)

One court explained the basis for a public policy claim as follows:

> Employees have redress if they lose their jobs "for asserting a legally guaranteed right (e.g., filing worker's compensation claim), for doing what the law requires, (e.g., serving on a jury) or for refusing to do that which the law forbids (e.g., committing perjury)."

Yovino v. Fish, 539 N.E.2d 548 (Mass. App. 1989).

Heslop was never asked to, nor did he violate either of the statutes he asserts as a basis for a public policy claim--U.C.A. §7-1-318 (call reports) and U.C.A. §78-24-6 (subpoenas). If Heslop had been told to sign and file a false call report, had refused to do so, and had then been fired; or, if Heslop had been told not to produce his notes when they were subpoenaed by Beutler, had in fact produced his notes, and had then been fired, then he might have a public policy claim. Neither of those fact situations apply in this case.

Heslop's objections to the accrual problem were made internally only. He never reported the accrual problem to regulatory authorities. House v. Carter-Wallace, Inc., 232 N.J. Super. 41, 556 A.2d 353 (1989) affirmed summary judgment in favor of employer on House's public policy claim where House's complaints regarding an alleged company violation of public policy were expressed in a corporate executive meeting, but never reported to any governmental or other outside authority. Accord cases cited in House, Id. at 357. Internal complaints give rise to a public policy claim only where the employee threatens to report the alleged violation to outside parties and is terminated before the complaint can be made. Id. In addition, House held there was no basis for inferring House was discharged to prevent him from reporting his views to authorities since three months passed between the date he learned about the problem and the date of discharge.

In the instant case, Heslop knew about the accrual problem for more than one year from the date he resigned and had numerous opportunities to report to the regulatory authorities what he claims was a clear-cut violation of law, but never did, which failure forecloses his public policy claim.

That Heslop's internal behavior with respect to the accrual problem could be considered praiseworthy does not provide the basis for a public policy claim. See Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974); Rinehimer v. Luzere City Com. College, 539 A.2d 1298 (Pa. Super. 1988)

Cases cited by Heslop are distinguishable. In Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250 (1986) Wagner was terminated after he affirmatively reported an illegal arrest to the judge who was sentencing the arrestee. Heslop never reported his concerns to outside authorities.

The facts do not support a public policy claim on the theory Heslop was terminted for refusing to acquiesce in illegal conduct. Even assuming illegality, Heslop did ultimately acquiesce in the course chosen to correct the accrual problem. Concern that he might have been subjected to a criminal charge is not causally connected to Heslop's termination.

In Delaney v. Taco Time, Int'l., 297 Or. 10, 681 P.2d 114 (1984) defendant admitted it expressly discharged Delaney when he refused to sign a false and slanderous statement. No such facts exist in Heslop's case.

In McQuarty v. Bel Air Convelescent Home, Inc., 69 Or. App. 107, 684 P.2d 21 (1984) plaintiff was expressly fired on the spot after a heated argument with her superior during which plaintiff threatened to report his alleged patient abuse to the Health Division. This is totally different from Heslop's case. Heslop was not expressly fired even when he had disagreements with other officers, but instead his offers to resign were not accepted either in 1981 and January 1983.

Johnson v. World Color Press, Inc., 147 Ill. App. 3rd 746, 498 N.E.2d 575 (Ill. App. 1986) and Johnson v. Kreiser's, Inc., 433 N.W.2d 225 (S.D. 1988) were reversals of trial courts'

grants of defendants' motions to dismiss for failure to state a cause of action, not directed verdicts at the conclusion of all plaintiffs' evidence as occurred in the instant case.

In Harlis v. First Nat'l. Bank in Fairmont, 289 S.E.2d 692 (W.Va. 1982) plaintiff continued to work after a demotion, was subsequently reinstated, and thereafter expressly terminated.

None of the cases cited by Heslop in Point H of his brief involved constructive discharge, but express terminations. This shows how tenuous any causal connection is between an alleged public policy violation and a constructive discharge.

There is no basis for a public policy claim in this case, either in tort or contract as a matter of fact or law, and the court should affirm the trial court's dismissal of the same.

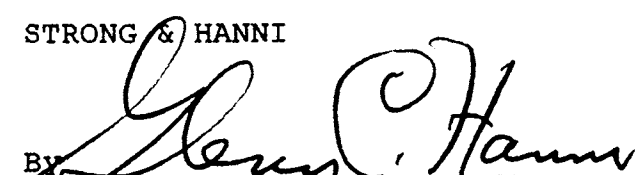
CONCLUSION

This Court should reverse the judgment for Heslop and order entry of judgment for the Bank, or in the alternative order a new trial.

This Court should affirm the trial court's ruling on attorney's fees, summary judgment dismissing the tort public policy claim, and dismissal of the contract public policy claim.

Respectfully submitted this 21 day of August, 1991.

STRONG & HANNI

By 

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CERTIFICATE OF HAND DELIVERY

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant Bank of Utah was hand delivered on August 21, 1991, to the following:

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Stuart H. Schultz

ADDENDUM INDEX

ADDENDUM 1

have already been decided by the Jury. And the cases are very clear, and I have cited you a case in my memorandum that if there are disputed facts, then the JNOV is not appropriate.

Now counsel has requested--or suggested that your Honor should have made an instruction to the jurors that the accrual problem, the investigations of the bank, and the circumstances surrounding the Timmons hiring did not relate to the constructive discharge issue, or the implied in fact contract issue. We submit, your Honor, that it would have been very inappropriate to make such a specific statement to the jurors, telling them which facts applied to specific issues in the case. Moreover, at trial, the Defendants had an opportunity to argue their version, or their view of the facts and of the issues in the case. They were not limited in any way in doing that.

In chambers, prior to the trial, when you gave the Instructions to the jurors stating that the public policy claim had been dismissed from the case, you reviewed your statement with counsel. And after reviewing that statement, you said do you have any additions? Do you have any corrections? At that point in time, Mr. Hanni did not stand up and say, yes, I believe that we should also have a specific Instruction

to the jurors that these facts do not apply to those other issues in the case.

THE COURT: He had already made that argument, hadn't he?

MR. GRIFFIN: Pardon me?

THE COURT: He had already made that argument to me, and I had rejected it.

MR. GRIFFIN: Well, he had--that's true, you had rejected it on the public policy ground. But he had not made the argument that these facts, the accrual problem, the circumstances surrounding Timmons' hiring, and also the investigations, were irrelevant to the constructive discharge and the implied in fact contract issues. He had not made that argument.

THE COURT: He raised the issue, there is no question about that. And I rejected it. Whether he made the argument or not, I guess is getting into semantics.

MR. GRIFFIN: Okay. Anyway, he certainly had every opportunity to present his view of the facts and the issues on the case.

I think what we need to do is look at Heslop's record at the bank. His record shows a very long term history of promotion. And implied in that promotion was support from Mr. Browning. And presumably the other

ADDENDUM 2

strict language concerning how far they will go in recognizing the public policy exception to the at will rule. And they use the words that you have all brought to my attention, that the exception must involve substantial and important public policies, and we are to construe public policies narrowly, generally utilizing those based on prior legislative announcement or judicial decisions applicable to those principles, which are so substantial and fundamental that there can be virtually no question as to their promotion of the public good.

I don't think this is a public policy case for the following reasons: The Plaintiff alleges several reasons why public policy should be brought into this case. The first is that he cooperated with the Attorney General, and this made one of the directors angry. Assuming that to be true, this happened a year and a half or so prior to Plaintiff's termination. There is no suggestion that that carried--at least no clear evidence that that anger carried on, and was significant beyond that. Everyone else cooperated with the Attorney General.

The second suggestion is, and I don't know that this is in the pleadings, this is something that came out in trial, and it may be the most important suggestion of a

violation of public policy, and that's the fact that the bank's attorneys asked Mr. Heslop to turn over his notes so that they could claim that the notes were privileged. My understanding of what the rule of privilege is does not include that. I think that would be wrong. I think that's an attempt to improperly hide evidence from authorities.

The Defendant didn't go along with that. The bank in response to that hired--excuse me. The Plaintiff didn't go along with that. The bank hired an attorney to represent the Plaintiff.

MR. GRIFFIN: Well, he did submit his notes.

THE COURT: The Attorney General's investigation was concluded without any serious incident to the bank. This also was remote in time to the time of Plaintiff's termination.

I find it very significant that after both of those events, in response to the Plaintiff's reassignment, he went to Mr. Browning and offered to resign. And that resignation was not accepted. And he was in fact talked out of resigning. I think that's a significant intervening event which suggests to me that even though there might have been a public policy explanation for the termination, I think it would be a slim one if there is one. That that intervening event cut off any

suggestion that that was the cause for the ultimate termination.

The only thing that remains is Mr. Heslop's acceptance of a subpoena, and the fact that he turned over his notes. There is no suggestion that anybody said he shouldn't respond to that subpoena, that he shouldn't turn his notes over in response to it. There is no evidence that that led to his termination in my opinion, at least not to the fact that he responded to the subpoena. But there may be some suggestion that the content of the notes themselves may have caused some anger on the part of management. And that would be understandable, I suppose, considering what the text of the notes was, since the notes were critical of both Mr. Timmons and Mr. Browning. But I don't think that is a public policy issue. That's simply the employee-employer relationship issue that you have in almost any termination case. And I don't think it has anything to do with the subpoena. The fact that the subpoena resulted in their being aware of the content of the notes doesn't bring it under the public policy exception in my opinion.

For those reasons, and for reasons stated in the memoranda that I have read that would limit it to these brief cases, I think this is not a public policy case.